Federal Court  Cour fédérale

Date: 20211229

Docket: T-1347-20

Citation: 2021 FC 1475

Ottawa, Ontario, December 29, 2021

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicant

and

ROYAL CANADIAN MOUNTED POLICE COMMISSIONER BRENDA LUCKI AND ATTORNEY GENERAL OF CANADA

Respondents

and

CIVILIAN REVIEW AND COMPLAINTS COMMISSION FOR THE ROYAL CANADIAN MOUNTED POLICE

Intervener

JUDGMENT AND REASONS

I. Overview

[1] The British Columbia Civil Liberties Association [BCCLA or the Applicant] is a not-for-for profit organization that promotes civil liberties and human rights across Canada. An important part of its mandate aims at ensuring public accountability for police misconduct.

[2] The Civilian Review and Complaints Commission for the Royal Canadian Mounted Police [CRCC or Intervener] is a civilian body independent of the Royal Canadian Mounted Police [RCMP], which receives complaints from the public and conducts reviews or initiates investigations into the RCMP's conduct.

[3] Back in February 2014, the BCCLA submitted a complaint to the Commission for Public Complaints against the RCMP [CPC] (the predecessor of the CRCC) alleging that RCMP members had illegally spied on Indigenous and climate advocates opposed to the Northern Gateway pipeline. The complaint also alleged that the RCMP had unlawfully shared the collected information with other government bodies and private sector actors.

[4] In June 2017, the CRCC completed its report [Interim Report] and sent it to the RCMP Commissioner for her written response, as provided for by the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act].

[5] After numerous correspondence to the Commissioner by the Applicant and by the Intervener, unsuccessfully urging her to respond to the Interim Report, the Applicant launched this Application for judicial review in November 2020. The Applicant then sought i) a declaration that the RCMP Commissioner had breached her duty under s. 45.76(2) of the RCMP

Act, ii) a writ of mandamus directing the RCMP Commissioner to provide her response, and iii) a declaration that the delay to respond to the Interim Report infringed section 2(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

[6] Considering the Commissioner finally issued her written response to the Interim Report shortly after this Application was filed, the Applicant no longer seeks a writ of mandamus. However, it insists that the Court rule on the other orders sought, arguing the Commissioner did not respond to the Interim Report "as soon as feasible," as dictated by the RCMP Act. Meanwhile, the Respondents argue that the Application should be dismissed for mootness.

II. Facts

A. *Process of the Civilian Review and Complaints Commission and History of RCMP Commissioner's Responses to Interim Reports*

[7] A complaint against the RCMP or one of its members is investigated by the RCMP's internal board of inquiry, created under Part I of the RCMP Act, unless the CRCC decides to investigate it itself. Even when the RCMP investigates the complaint internally, an unsatisfied complainant can refer it to the CRCC for review.

[8] In both cases, section 45.76 of the RCMP Act provides that on completion of the investigation or hearing, the CRCC prepares and sends to the Minister and the RCMP Commissioner, an interim report setting out any findings and recommendations with respect to the complaint that it sees fit. Of note, the complainant does not receive a copy of the interim

report. “As soon as feasible” after receiving the interim report, the RCMP Commissioner must provide her response and indicate any actions that have been taken or will be taken with respect to the complaint or, alternatively, explain why none will be taken. After considering the Commissioner’s response, the CRCC prepares a final report with findings and recommendations that is, this time, also sent to the complainant.

[9] For over a decade, the CRCC and its predecessor have raised concerns about delays in the RCMP Commissioner’s response to interim reports:

- A 2007 CPC report mentioned a backlog of interim reports awaiting response from the RCMP Commissioner, with an average delay of 155 days;
- In its 2008-2009 annual report, the CPC noted that the 2007 backlog was being resolved, with only two outstanding reports remaining;
- The 2009-2010 annual report stated that the backlog had returned, with 10 responses outstanding for 6-12 months and one outstanding for over a year;
- In 2010-2011, the CPC reported 20 interim reports that had been awaiting responses for 6-12 months and two waiting for over a year;
- In 2011-2012, the CPC reported that 17 interim reports had been waiting for a response for 6-12 months and 21 had been waiting for over a year;
- In 2012-2013, the CPC reported some progress in reducing the backlog, with zero interim reports outstanding for over six months;
- In 2013-2014, the CPC reported that only two interim reports had been outstanding for more than six months.

[10] In 2014, amendments to the RCMP Act came into force, making the CPC into the CRCC. At the same time, Parliament inserted language into section 45.76 requiring the RCMP Commissioner to respond to CRCC interim reports "as soon as feasible," where there previously was no time limit. However, it did not seem to have a significant and lasting impact on responses from the Commissioner:

- The CRCC's 2014-2015 and 2015-2016 annual reports did not mention issues with timeliness of the RCMP Commissioner's response to interim reports;
- In 2016-2017, the CRCC reported a new backlog with over 70 interim reports awaiting a response, "some" of which had been waiting for over a year;
- In 2017-2018, the CRCC reported its concern with the backlog of interim reports, and that "some" had been waiting more than 18 months. It also acknowledged that the RCMP Commissioner responded to more such reports in 2017-2018 than in 2016-2017;
- The 2018-2019 Annual Report did not mention delays or backlogs.

[11] In December 2019, the CRCC and the RCMP Commissioner signed a Memorandum of Understanding [MOU] that created a six-month target for the RCMP Commissioner's responses. Again, it seems that the parties failed to achieve their goal:

- In 2019-2020, the CRCC reported that 64 interim reports had been awaiting a response for one to two years, 48 had been waiting for two to three years, and six had been waiting for more than three years.

[12] In February 2021, the Director of the RCMP National Public Complaints Directorate [Directorate], which is responsible for analyzing interim reports from the CRCC and advising the RCMP Commissioner accordingly, filed an affidavit on behalf of the Respondents in this

Application. He states that, at that time, there were 140 interim reports from the CRCC awaiting a response from the RCMP Commissioner and that the Directorate was in the process of hiring new employees to help clear the backlog; he warned however that it is a lengthy and complicated process.

[13] On September 7, 2021, the Acting Director of the Directorate provided an affidavit updating the above numbers. He states that the Directorate has made progress on reducing the backlog and that by September 2021 there were only 32 interim reports awaiting a response from the RCMP Commissioner. He adds that he is confident that the backlog should be cleared by the end of November 2021. He also states that all interim reports received after April 1st, 2021 would receive a response within six months.

B. *The Applicant's Complaint to the CRCC*

[14] In February 2014, the BCCLA filed a complaint to the CRCC alleging that members of the RCMP had illegally monitored environmentalists and violated their constitutional rights in the context of National Energy Board hearings held in British Columbia in relation to the Northern Gateway pipeline.

[15] **In June 2017**, the CRCC completed its Interim Report with findings and recommendations and provided it to RCMP Commissioner.

[16] On cross-examination, former Superintendent of the RCMP confirmed that no analyst was assigned to work on this Interim Report **until July 2020**.

[17] The RCMP Commissioner responded to the Interim Report in November 2020, after this Application was commenced, more than three years after receiving the Interim Report and almost seven years after the Applicant filed its complaint with the CRCC.

[18] Finally, the CRCC released its final report on the Applicant's complaint on December 15, 2020.

III. Issues

[19] This Application raises the following issues:

A. *Is the dispute moot? If so, should the Court exercise its discretion to hear the Application?*

B. *Is declaratory relief available to the Court in the present case?*

C. *Did the Commissioner breach her duty to respond to the Interim Report 'as soon as feasible'?*

D. *Should the Court engage in a Charter Analysis and if so, is section 2(b) of the Charter engaged?*

E. *Should the Court grant special costs?*

IV. Analysis

A. *Is the dispute moot? If so, should the Court exercise its discretion to hear the Application?*

[20] The Respondents submit that the Application is moot because the Commissioner provided her response to the Interim Report. They argue that the doctrine of mootness applies equally to the availability of declaratory relief (*Moses v Canada*, 2003 FC 1417 at para 13). The underlying basis for the dispute between the parties no longer exists because the Applicant has obtained the core relief that it was seeking through its Application.

[21] In addition, the Respondents submit that the Court should not exercise its discretion to decide this moot case because the relevant factors set forth in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [*Borowski*] weigh against it. Making a decision on the dispute is an uneconomical use of judicial resources because a decision would have no practical effect on the rights of the parties (*Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 14). Finally, the Respondents argue that interpretation of the term "as soon as feasible" would be better dealt with in the context of an actual live dispute, considering that Parliament specifically chose not to include a specific timeframe in the RCMP Act.

[22] In my opinion, this issue does not turn on whether or not I find this matter to be moot. It rather turns on whether or not, in the circumstances described above, the Court should exercise its discretion to nonetheless rule on the two remaining remedies sought in this Application. That it so because even if I find the case to be moot, I would choose to exercise my discretion to rule on these issues. In *Borowski* (at 353), the Supreme Court of Canada sets out a two-step analysis:

> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its

> discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[23] When choosing to exercise its discretion to hear a case that is moot, the Court should consider the three basic purposes of the mootness doctrine.

[24] First, a Court's competence to resolve legal disputes is rooted in the adversarial system. Therefore, it may be appropriate to hear a dispute if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail (*Borowski* at 358-359).

[25] Second, there is a need to ration scarce judicial resources. In some cases, hearing the controversy could be worthwhile to conserve judicial resources. In particular, this concern is relevant if the Court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy, which gave rise to the application (*Borowski* at 360). Similarly, it could be relevant to hear cases which although moot are of a recurring nature but brief (*Borowski* at 360). In addition, hearing a moot dispute could be justified in cases which raise an issue of public importance of which a resolution is in the public interest (*Borowski* at 361).

[26] Third, the Court should be aware of its proper "law-making function"; pronouncing judgments in the absence of a dispute affecting the parties may be viewed as intruding into the role of the legislative branch of government (*Borowski* at 362).

[27] In my opinion, the second purpose of the mootness doctrine weighs heavily in favour of disposing of the remaining issues raised by this Application. The Court has already expended significant resources on hearing this case, which would go to waste if the Court were to decline to render a decision. In *0769449 B.C. Ltd. (Kimberly Transport) v Vancouver Fraser (Port Authority)*, 2016 FC 645 at para 26 [*Kimberly Transport*], this Court stated, "an application for judicial review can certainly be dismissed for mootness at the time of the hearing without the necessity of a motion prior to the hearing." However, it also found that "[t]o the extent that the Court should be mindful of utilizing scarce judicial resources by hearing matters which are otherwise moot, those resources were, for the most part, already expended upon the hearing of this matter" (*Kimberly Transport* at para 26).

[28] In addition, if the past is any indication of the future, it is likely that without judicial intervention, this situation will repeat itself. Both the Applicant and the Intervener have a live interest in obtaining a ruling on the issues they have raised and debated on, so history does not repeat itself. As indicated above, the CRCC has struggled with significant delays for over a decade. Pending receiving a response from the RCMP Commissioner, the CRCC is prevented from issuing its final report to the complainant and the RCMP is delayed in implementing recommendations and improving its processes.

[29] As an illustration of the above, the Applicant was one of the complainants who had called upon the CRCC to launch an investigation into the RCMP's response to protestors in the Wet'suwet'en territory, located in New Brunswick. In its 2019-2020 Annual Report, the CRCC indicated that the Commissioner's failure to respond to a previous interim report (regarding

protests in Kent County, New Brunswick) which contained similar issues as those raised during the “Wet’suwet’en crisis” had a negative impact on its investigation and course of conduct. In other words, the systemic delays described above are of recurrent nature for all the parties. They have an impact on the CRCC’s ability to fully exercise its oversight role over the RCMP and on the RCMP’s good policing practices.

[30] I am mindful of the Respondents’ evidence that the RCMP hired new analysts in 2020 and 2021 to help clear the backlog. However, on the other side of that coin, it could be said that this Application was instrumental in the RCMP’s staffing decision. I also agree with the Applicant that it is too soon to know whether these changes will resolve the systemic issues, as similar changes in the past have not yielded lasting results. On several occasions, the RCMP Commissioner has cleared the backlog, only for it to return.

[31] In my view, it is in the public interest to have a police oversight institution that functions properly and is unobstructed. The CRCC considered that the complaint it received from the Applicant merited a public interest investigation. The Applicants have explained the important consequences of these delays on the public’s ability to obtain information about police misconduct and to remedy policies that can cause harm to the public. Therefore, it is in the public interest for the Court to provide an interpretation of section 45.76(2) of the RCMP Act.

B. *Is declaratory relief available to the Court in the present case?*

[32] Declaratory relief may be granted when: (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in

its resolution; and (d) the respondent has an interest in opposing the declaration sought (*Ewert v Canada*, 2018 SCC 30, at para 81; *SA v Metro Vancouver Housing Corp*, 2019 SCC 4, at para 60).

[33] In this case, the contentious issue is whether the dispute is "real and not theoretical." It is not controversial that this matter falls within the jurisdiction of the Court and that the Applicant (as well as the Intervener) has a genuine interest in its resolution, and that the Respondents have an interest in opposing the declaration sought. While the RCMP Commissioner has now provided her response to the Interim Report, the issues of systemic delays and interpretation of section 45.76(2) of the RCMP Act remain. In its Notice of Application, the Applicant has initially asked for a declaration that the RCMP Commissioner breached her duty under section 45.76 of the RCMP Act. The parties have provided significant evidence on the years of systemic delays and they have provided lengthy observations on statutory interpretation. In my view, that aspect of the dispute is real, the Court has the jurisdiction, it has sufficient evidentiary record, and there is sufficient adversarial context to issue the declarations sought.

C. *Did the Commissioner breach her duty to respond to the Interim Report 'as soon as feasible'?*

[34] The Applicant submits that the plain meaning of "as soon as feasible" is the same as "as soon as possible," especially taking into account the French version of section 45.76(2) of the RCMP Act which reads "*dans les meilleurs délais*." The Applicant submits that an analysis of the legislative purpose of the provision reveals Parliament introduced it following a "crisis of confidence in the RCMP" and that allowing a significant delay in the resolution of complaints

about RCMP conduct would be contrary to the provision's legislative purpose. The Applicant argues that an analysis of the external context reveals that a timeline between 30 days and 6 months would be "feasible." It points out that the Supreme Court of Canada interpreted the terms "as soon as feasible" found in the *Copyright Act*, RSC, 1986, c. C-42, such that steps must be taken to ensure such obligations are met "quickly and efficiently" (*Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38 at para 31 [*Rogers Communications*]).

[35] The Respondents concede that an expectation of around six months would be a reasonable timeline for the "as soon as feasible" requirement of section 45.76(2) of the RCMP Act, with some flexibility for more complex reports. The Respondents also concede that the RCMP Commissioner's response time in the present case violated that element of her statutory obligation. They favour a "flexible case by case approach," recognizing that the Commissioner has some discretion to determine when a response is feasible. The Respondents disagree with the Applicant's assessment that the dictionary meaning of "as soon as feasible" indicates any sense of urgency, but rather refer to convenience or reasonableness. The Respondents submit that the *Rogers Communications* precedent is of limited assistance because the phrase "as soon as feasible" appeared in a different statutory scheme and interpretation of that phrase was not directly at issue.

[36] For the Intervener, "as soon as feasible" means "soon, expeditiously, or reasonably promptly" and a maximum of six months is a reasonable timeline that the RCMP Commissioner should meet in almost all cases. Hansard demonstrates that the intention of Parliament was to add a temporal limitation to the RCMP's timeframe to respond to CRCC's interim reports. The

ordinary meaning of “feasible” is “practicable” and the test of practicability is reasonableness. In addition, the Intervener asks the Court to provide more guidance on the RCMP Commissioner’s duty under section 45.76 of the RCMP Act, as it is concerned that, taking into account the historical cycle of delays set out above, the resources assigned today may be shifted to other pressing priorities tomorrow.

[37] At the close of the hearing, it became obvious that the parties agreed in principle that absent exceptional circumstances, a six-month deadline would be a reasonable interpretation of the “as soon as feasible” requirement.

[38] This is consistent with the modern approach to statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, the Supreme Court stated that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

[39] In my view, a three-and–a-half year delay is certainly not a reasonable interpretation of the “as soon as feasible” in the Act. Nor does it mean whenever resources become available. In the case before me, it took the Commissioner a full three years to assign an officer to the case and once the officers were assigned, it took the Commissioner only a few months to issue a five-page response to the Interim Report, in which she accepts all the CRCC’s findings and recommendations. I agree with the Intervener that it would be imprudent to allow the Commissioner to under-resource the Directorate and claim that lengthy delays are due to volume of Interim Reports and insufficient resources. Rather, “as soon as feasible” requires an institution

to arrange its resources such that it can discharge its obligations "quickly and efficiently" (*Rogers Communications* at para 31).

[40] Furthermore, it is important to consider the statute as a whole, including its French version, which uses the term "*dans les meilleurs délais*." This, arguably, indicates an obligation that is more time sensitive than "as soon as feasible." For bilingual statutes, where there is any apparent disconnect between the two official versions, "the common meaning is normally the narrower version" (*R. v Daoust*, 2004 SCC 6, at paras 27-29). Therefore, I favour a narrower interpretation of "as soon as feasible" that indicates a sense of urgency. In light of the consensus that transpired at the hearing, and in light of the terms of the MOU signed by the CRCC and the RCMP, a six-month deadline would be a reasonable interpretation of the requirement imposed on the RCMP Commissioner. It would then be on her to argue that exceptional circumstances warrant a longer delay.

D. *Should the Court engage in a Charter Analysis and if so, is section 2(b) of the Charter engaged?*

[41] The Applicant submits that the RCMP Commissioner's "extreme delay" in responding to the Interim Report violated its right to freedom of expression under section 2(b) of the Charter, either in its purpose or in its effects. The Applicant argues that it is established that access to information is a derivative right to section 2(b) of the Charter (*Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 30 [*CLA*]). The Applicant has a long history of publicly commenting on CRCC's findings, but was not able to do so in the present case until the final report was issued, which could not occur before the RCMP

Commissioner responded to the Interim Report. The Applicant argues that this establishes its prima facie case because its meaningful public discussion and criticism on matters of public interest were impeded by the delay.

[42] The Respondents argue that Supreme Court jurisprudence establishes that when a matter can be decided on administrative grounds, Courts should refrain from deciding on Charter issues. The Respondents submit that the RCMP Commissioner's delay did not prevent the Applicant from engaging in its advocacy work or from publicly discussing the merits of the complaint. They argue that the framework proposed by the Supreme Court in the *CLA* case does not apply here because i) it has only been applied to Access to Information requests, ii) and the Applicant has not demonstrated that the RCMP Commissioner's delay impeded its meaningful exercise of freedom of expression.

[43] First, I agree with the Respondents that when a matter can be dispensed with on administrative law grounds, the Court should refrain from deciding the Charter issues (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 11; *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 19; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 at para 105). This policy is based on the premise that unnecessary constitutional pronouncement may prejudice future cases, the implications of which have not been foreseen (*Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC 1181 at para 64).

[44] I also agree with the Respondents that this principle is of particular importance in this case as the Applicant's Charter claims involve a novel expansion of section 2b) protection to delays in an administrative process. In my view, this argument is better left for a future debate as it could have significant impact on administrative tribunals and administrative decision makers.

[45] I will therefore refrain from engaging in a Charter analysis.

E. *Should the Court grant special costs?*

[46] While the Intervener does not seek costs, the Applicant submits that this is a rare but appropriate case for an award of special costs.

[47] In *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 140 [*Carter*], the Supreme Court held that an order of special costs may be granted where the litigation raises public interest matters that are exceptional, the party has no proprietary or pecuniary interest in the litigation, and the case would not have gone forward with private funding.

[48] At paragraph 89 of its memorandum of fact and law, the Applicant gives few examples as to why it considers that public trust and confidence in the accountability of the country's national police force can only be described as a matter of significant public interest:

> Some of those cases are extremely serious, including a CRCC report on the RCMP investigation into the alleged sexual assault of a minor. That report has been waiting for well over two years for a response. In another disturbing case, the RCMP took nearly four years to respond to a CRCC interim report about an incident where a woman was left alone, topless and with a broken arm in an RCMP cell without medical attention because officers believed she

> was “faking” the injury. The CBC reported on the sad case of Michael Mullock, who died in an RCMP cell from a stroke while a CRCC interim report with recommendations involving a highly similar case in that same detachment sat on the RCMP Commissioner's desk. [Citations omitted.]

[49] The people involved in these cases, says the Applicant, are normally quite vulnerable and not in a position to challenge the RCMP’s behavior before the Courts.

[50] The Respondents, on the other hand, state that in *Carter*, the Supreme Court emphasized that issues of public importance will not in themselves “automatically entitle a litigant to preferential treatment with respect to costs” (*Carter* at para 139). Further, the Respondents submit that unlike the expansive constitutional challenge at issue in *Carter*, the scope of the present application is fairly contained. The Applicant is not an individual litigant and has not demonstrated that these issues could not have been pursued with private funding, or that it would be otherwise contrary to the interests of justice to deny them special costs.

[51] Although I agree with the Applicant that this case raises important public interests issues, I nevertheless agree with the Respondents that it does not raise very complex issues and that its scope is fairly contained. I will therefore exercise my discretion and grant costs to the Applicant in the lump sum amount of $30,000.00 all-inclusive.

V. Conclusion

[52] For the above reasons, I am of the view that it would be against the interests of justice not to dispose of the remaining issues even if the Application for mandamus is now without object. I

am also of the view that the factual background of this case is better dealt with by resorting to administrative law principle and the Court should use its discretion not to rule on the Charter issue raised by the Applicant. That said, I find that the RCMP Commissioner is in violation of her obligation under section 45.76 of the RCMP Act to respond to the Interim Report “as soon as feasible.” I also find that a reasonable interpretation of the “as soon as feasible” requirement found in section 45.76 of the RCMP Act is, absent exceptional circumstances, a maximum of six months. Finally, costs for $30,000.00 all-inclusive, will be granted to the Applicant.

JUDGMENT in T-1347-20

THE COURT CONCLUDES that:

1. This Application is granted in part;
2. The RCMP Commissioner is in violation of her obligation under section 45.76 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, to respond to the Interim Report "as soon as feasible";
3. A reasonable interpretation of the "as soon as feasible" requirement found in section 45.76 of the *Royal Canadian Mounted Police Act* is, absent exceptional circumstances, a maximum of six months;
4. Costs for $30,000.00 all-inclusive shall be paid by the Respondents to the Applicant.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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